ruling it is for them to appeal against the ruling, or file a fresh motion as directed by the judge.

In my judgment it is impossible to read the ruling without seeing that the court expressly said:

(i) that the interim injunction remains on the cause list and has not been struck out or dismissed;

(ii) that the defendants are at liberty to come before the court with a fresh motion on another day

I must say I cannot find in the ruling given by the learned judge any justification for reading it in the manner for which the defendants claimed. In my view the plain words of that ruling are too clear to permit any doubt and I find myself in agreement with the submissions of the counsel for the plaintiff.

As both counsel have been at pains to make it clear in their arguments there will also be an order that the parties get on with the action with proper expedition.

The application of the defendants is accordingly dismissed.

*Application dismissed.*

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## ESSO STANDARD MALAYA BHD. v. SOUTHERN CROSS AIRWAYS (MALAYSIA) BHD.

**[O.C.J. (Raja Azlan Shah J.) January 10, 1972]**

**[Kuala Lumpur — Civil Suit No. 985 of 1971]**

*Practice and Procedure — Action — Claim for goods sold and delivered — Counterclaim for defamation — Whether has any material affinity with subject matter of claim — Striking out — R.S.C. 1957, O. 21, r. 15.*

*Practice and Procedure — Summary judgment — Claim for goods sold and delivered — Construction of documents — No triable issues — R.S.C., 1957, O. 14.*

*Contract — Construction — Credit card arrangement — Whether binding — Whether subject to execution of formal contract.*

This was an application for summary judgment under R.S.C. Order 14. The plaintiffs claimed a sum of $704,762.51 for the sale and supply of aviation fuel to an aircraft, belonging to the defendants, at various airports, including Kuala Lumpur, for the period between June 1971 and September 1971.

On November 25, 1971, the plaintiffs filed their statement of claim, and simultaneously applied for and obtained an order of attachment, before judgment, against the defendants' aircraft. On November 27, 1971, the said order was set aside, and this formed the subject matter of a counterclaim for defamation against the plaintiffs.

The defendants admitted that the fuel was supplied, but denied all liabilities. They contended that they were liable to pay at the price thereof, *ab initio*, to be fixed when a formal contract came to be made and executed on or about two weeks from then.

Prior to the establishment of a proposed formal contract, the arrangement arrived at between the parties was contained in three letters and five credit cards.

Thus, the court had to construe, *inter alia*, the meaning of the three letters to determine the nature of the arrangement arrived at between the parties.

**Held,** allowing the application: (1) there were no triable issues. This was simply a case of construction of certain documents which passed between the parties;

(2) the counterclaim was to form the subject matter of a separate action. It is settled law that a counterclaim cannot be maintained unless it is shown that the relief claimed is sufficiently connected with or allied to the subject matter of the principal claim as to make it necessary in the interests of justice that it should be dealt with along with the claim. Thus, a counterclaim for libel cannot be maintained in a claim for money lent;

(3) there was an immediate binding contract based on the credit card arrangement. The letters were not expressed in such a way as to show clearly that the execution of a formal contract was made a condition precedent to the existence of a binding arrangement. There were no words appropriate for introducing a condition or stipulation.

*Per* Raja Azlan Shah J.: "It is, I think, right that an order under Order 14 should be made only if the court thinks it is a plain case and ought not to go to trial. If one simply has a short matter of construction with a few documents, the court, on summary application, should decide what in its judgment is the true construction. There should be no reason to go formally to trial where no further facts could emerge which would throw any light upon the letters that have to be construed."

**[Editorial Note:** The defendants withdrew their appeals in the Federal Court (Federal Court Civil Appeal Nos. 124 and 125 of 1971). Ong C.J., Gill and Ali F.JJ. struck out the appeals and awarded costs of the appeal to the respondents/plaintiffs.]

*Cases referred to:-*

(1) *High Commissioner for India & Ors.* v. *Ghosh* [1959] 3 W.L.R. 811.

(2) *Shanghai Hall Ltd.* v. *Townhouse Hotel Ltd.* [1967] 1 M.L.J. 223.

(3) *Von Hatzfeldt-Wildenburg* v. *Alexander* [1912] 1 Ch. 284 at p. 258.

(4) *Chillingworth* v. *Esche* [1924] 1 Ch. 97.

CIVIL SUIT.

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**Raja Azlan Shah J.:** This is an application for summary judgment under R.S.C. Order 14. The plaintiffs claim a sum of $704,762.51 against the defendants for the sale and supply of turbo fuel to their aircraft, Boeing 707, Registration No. 9M-AQD at various airports — Nairobi, Plaisance, Zaventem, Gatwick, Subang, Karachi, Essanboga, Luxemburg, Bangkok and Athens — for the period between June 1971 and September 1971. The particulars are annexed to the statement of claim which was filed on November 25, 1971.

On the same day the plaintiffs applied for and obtained an order of attachment before judgment against the said aircraft. The said order was set aside on November 27, 1971. This now forms the subject matter of a counterclaim for defamation against the plaintiffs.

The defendants filed their statement of defence on December 8, 1971. Save that the supply of fuel is admitted, the defendants deny all liabilities. The forefront of their defence is that they agreed to accept the supply of fuel by the plaintiffs upon their promise and undertaking that the price thereof *ab initio* would be fixed and adjusted when a formal contract is executed. They say that on the faith of that

arrangement they had paid a total of $325,732.56 and that that sum was now in excess of payments due to the plaintiffs for which they are entitled to be given proper credit. In short, the defendants now say that they are liable only to pay at the price to be fixed when a contract came to be made and executed on or about two weeks from then. In other words, the present arrangement was only on a temporary basis until the price was fixed and embodied in a formal contract. Since June 1971 the defendants had requested the plaintiffs to finalise the said formal contract so that the price of fuel supplied and to be supplied might be agreed and fixed, thereby enabling the defendants to pay cash at the reduced fixed rate and to be credited the amount of overpayment already made.

On December 9, 1971 the plaintiffs filed an application for summary judgment. This is supported by the affidavit sworn by Enche Zulkifli Mohd. Isahak, the plaintiffs' National Accounts Representative on December 8, 1971. On December 13, 1971 the plaintiffs filed another application for an order to strike out the defendants' counterclaim under R.S.C. O. 21 r. 15. The defendants put in two affidavits in reply. One was from Mr. N. S. Mansfield, the project adviser and the other was from Mr. Carl James Wheatley, the director of operations.

Before I consider the merits of the two applications it is imperative to ascertain the arrangement arrived at between the parties. This consists of three letters and five credit cards (International Aviation Carnet Credit Cards). The first letter dated June 29, 1971, reads as follows:

"June 29, 1971

Our ref: 56A RK
Southern Cross Airways (M) Bhd.,
8th Floor, Wisma Damansara,
Kuala Lumpur.

International Aviation
Carnet No. ESMB-71-C-1

*Attention: Mr. Mansfield*

Gentlemen,

Further to our discussion on June 26, 1971, we enclose herewith an International Aviation Carnet No. ESMB-71-C-1 valid for the period July 1, 1971 to July 31, 1971.

Payment for fuel filled in all locations is due within 10 days from date of invoice. Payment can be made in Malaysian Dollars converted from the U.S. Dollar price on date of payment at the official telegraphic transfer selling rate for U.S. Dollars quoted by the Association of Banks in Malaysia.

We will be calling on you again in due course to finalise a yearly contract with you based on contract terms. Meanwhile if we can be of further service to you, please let us know.

Very truly yours,
(Cheong Kun Ming)
Industrial Trade Manager."

The second letter dated July 29, 1971 is in the following terms:

"July 29, 1971

In reply please refer to:
56A ZMI
Southern Cross Airways (M) Bhd.,
8th Floor, Wisma Damansara,
Jalan Semantan,
Kuala Lumpur. Carnet No. ESMB-71-C-2

*Attention: Mr. Mansfield*

Gentlemen,

Enclosed herewith please find Carnet No. ESMB-71-C-2 with validity up to August 31, 1971.

We wish to reiterate that the issuance of this carnet, on terms already familiar to you, is only a temporary measure. As mentioned during this afternoon's telephone conversation, we are in the process of developing details of pricing for offshore airports and we will be in a position to discuss your total requirements on contract basis, within two weeks' time. Until then, we regret any inconvenience caused in the meantime.

Please forward to this office your Carnet No. ESMB-71-C-1 as soon as it expires on July 31, 1971.

Very truly yours,
Cheong Kun Ming
Industrial Trade Manager."

The third letter is a reply from the defendants dated 2nd August 1971:

"2nd August 1971

Your Ref: 56A ZMI
Our Ref: CJW/AL/M-4/71
Industrial Trade Manager,
Esso Standard Malaya Berhad,
The Chartered Bank Building,
Kuala Lumpur.

Sir,

Your above referenced letter is acknowledged.
We look forward to your further contract within two weeks. We will forward Carnet ESMB-71-C-1 as soon as possible after expiration date.

Sincerely,
for Southern Cross Airways (M) Bhd.
(Sd.) C. J. WHEATLEY
Director of Operations."

The five credit cards are:

TX-9M-762-8274-ID valid until June, 1971;
ESMB-71-C-1 valid until July, 1971;
ESMB-71-C-2 valid until August, 1971;
ESMB-71-C-3 and ESMB-71-C-4 valid until December, 1971.

Two of the conditions of these credit cards are: clause (1) which, *inter alia*, states:

"... the customer holding this carnet is recommended for credit purchase of Esso branded aviation petroleum products from Esso authorised suppliers thereof at airports in countries for which this carnet is valid...";

clause (4) reads:

"The customer shall be obligated for the payment for all products purchased and obtained by the presentation of this carnet by anyone, whether authorised or not."

What was the arrangement? Enche Zulkifli stated in his affidavit that the agreed arrangement is evidenced by the exchange of letters and the 5 credit cards. At paragraph 5 he said:

"It was a term of the agreed arrangement that payment for the aviation fuel sold and delivered would be due within 10 days of the date of presentation of the relevant invoice in the amount stated in the said invoice."

He then made reference to the second paragraph of the letter dated June 29, 1971 for the aforesaid term of the said arrangement. Pursuant to the said agreement the defendants had taken delivery of fuel and had paid for them without any quibble — U.S.$90,468.70 and M$35,608.91 *vide* Exh. ZMI-2(-37) and M$77,403.-60 *vide* Exh. ZMI-3(1-7). The arrangement was the

same throughout. The defendants obtained delivery on the authority of the carnet cards. They signed the delivery receipts. Invoices were then made and submitted to the plaintiffs who in turn presented them to the defendants for payment. These were duly paid. The terms of payment were consistent with the language used in the plaintiffs' letter of June 29, 1971, that is, payment to be made within 10 days of date of presentation of the invoices; the price to be that at place of delivery converted into U.S. Dollars and subsequently converted into Malaysian Dollars at the rate prevailing on date of payment.

On the various dates stated in the particulars annexed to the statement of claim, the plaintiffs submitted 51 invoices totalling $704,762.51, the sum claimed in this action to the defendants. There was no response from the defendants. I have meticulously checked Exh. ZMI-4(1-51) which contains all the particulars and have satisfied myself that the plaintiffs had on those dates made demands from the defendants. Three reminders were sent to the defendants *i.e.*, letters dated October 19, 1971 and November 1 and 16, 1971 *vide* Exh. ZMI-5(1-3). It is of particular interest to note paras 4 and 5 of the letter of November 16, 1971. It reads:

"You have indicated that our revised prices to you are attractive and it is expected that we will meet again with you shortly to finalise the business on a contract basis. In this respect, we would appreciate your providing us with a Banker's guarantee for U.S.$150,000 before the end of November, 1971.

Please accept our thanks for giving us the opportunity to discuss the above matters with you."

In my opinion that is a further factor to be considered in ascertaining the arrangement between the parties.

Mr. Mansfield was the officer representing the defendants in the negotiation with the plaintiffs' representative, one Mr. Kwan. He said that the arrangement arrived at is as stated in paragraphs 2 to 6 of the statement of defence. In broad essence, the price which was to be agreed at a reduced rate would be embodied in a formal contract and whatever overpayments already made would be credited in favour of the defendants. Mr. Mansfield denied the authenticity of the delivery receipts. He said that the receipts could only be verified by members of the defendants' crew who were stationed in London, Europe and Kuala Lumpur. Mr. Wheatley repeated what was said by Mr. Mansfield. An additional point brought out by Mr. Wheatley is the standard practice in aviation business. He said that in the light of his 30 years' aviation business experience, his understanding of the said arrangement was that the price *ab initio* would be fixed and adjusted when a formal contract was executed.

Mr. Wong Soon Poh, who opposed the application submitted that the defence has raised several triable issues — (1) In addition to the defence, there is a counterclaim which is far in excess of the claim. (2) The price of fuel had not been agreed upon. There was no contract. (3) Insufficient particulars with regard to the arrangement. (4) Invoices were not verified and delivered; payment was only due 10 days after delivery of invoices.

I will now consider issues (1), (3) and (4) together. I disallowed the counterclaim to form part of the principal claim for the following reason. It is settled law that a counterclaim cannot be maintained unless it is shown that the relief claimed is sufficiently connected with or allied to the subject matter of the principal claim as to make it necessary in the interests of justice that it should be dealt with along with the claim. Thus a counterclaim for slander cannot be maintained in a claim for money lent. (See *High Commissioner for India* v. *Ghosh*[1]). In *Shanghai Hall Ltd.* v. *Townhouse Hotel Ltd.*,[2] I have detailed the various factors which, by no means exhaustive, may influence a judge in the exercise of his discretion under Order 21 rule 15. In the present case the subject matter of the counterclaim is for alleged libel of the defendants' business. I am at a loss to see how the subject matter of the counterclaim has any material affinity at all upon the subject matter of the claim which is a claim for the price of fuel supplied. I therefore ordered the counterclaim to form the subject matter of a separate action.

With regard to issue (3) it is clear that the arrangement was within the knowledge of the defendants. The exchange of correspondence between the plaintiffs and the defendants and the 5 carnet cards describe the arrangement.

With regard to issue (4), clause (4) of the condition attached to the carnet cards is adverse to the defendants. To say that the invoices, the subject matter of the present claim were not delivered to the defendants is against the weight of evidence. This can be seen from the various invoices annexed to Exh. ZMI-4(1-51) and three reminders *vide* Exh. ZMI-5(1-3).

I am now on issue (2) which I think is the crux of the matter. In my opinion this matter involves solely a question of construction whether on the few letters passed between the plaintiffs and the defendants there was a concluded contract. The principle which governs this case is plain. If there is a simple acceptance of an offer to purchase aviation fuel, accompanied by a statement that the offeror desires that the arrangement should be put on contract basis, the mere reference to such a proposal will not prevent the court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions to be specified in a formal contract, then until those conditions are thus specified, there is no final agreement such as the court will enforce. The classic statement of the issues involved is to be found in the judgment of Parker J. in *Von Hatzfeldt-Wildenburg* v. *Alexander*: [3]

"It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or a term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is

unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

It was argued here that all that was done was to agree to take delivery of and pay for the fuel, leaving the price to be settled by future arrangement. Once the price was agreed to (and that was to be at a reduced rate) and embodied in a formal contract, the accounts would be adjusted. What the defendants now say is that the execution of a formal contract incorporating the reduced price is a condition precedent to the existence of any binding arrangement. In my view the decision must however turn on the second paragraph of plaintiffs' letter of July 29, 1971:

"We wish to reiterate that the issuance of the carnet, on terms already familiar to you is only a temporary measure."

*The Shorter Oxford English Dictionary* meaning of "temporary" is

"lasting for a limited time; existing or valid for a limited time (only); transient; made to supply a passing need."

The question arises, what was the temporary arrangement? In view of the issuance of the carnet card arrangement, the answer is quite obvious. The defendants were obliged to pay if anyone, whether authorised or not, took delivery of the fuel by the presentation of the carnet (clause(4)). In my view no one could have had possession of the carnet except the defendants or their servants or agents (clause (1)). The defendants had been paying for such purchase for the amount stated in the invoices without any queries or objections. The price was to be that at the place of delivery. Then follows a reference to the preparation for a formal contract when details of pricing for off-shore airports and the defendants' total requirements were known. When the words "of a temporary measure" are linked with the words

"we are in the process of developing details of pricing for off-shore airports and we will be in a position to discuss your total requirements on contract basis",

"We will be calling on you again in due course to finalise a yearly contract with you based on contract terms",

"We look forward to your future contract within two weeks",

"You have indicated that our revised prices to you are attractive and it is expected that we will meet again with you shortly to finalise the business on a contract basis",

the whole thing seems to me to fall into shape. Those words in their context clearly mean that the efficacy of those documents was not made subject to the execution of a formal contract. In other words, the happening of that event, namely the execution of a formal contract was something which was going to put an end to the documents which the parties clearly treated as being operative. The dictionary meaning of "finalise" is

"coming to an end; making the last stage; ultimate; putting an end to something."

My whole reading of those letters is that there was an immediate binding contract based on the carnet card arrangement. If it was intended to show that the parties regarded themselves as entering into an agreement which was to last for a limited duration until something else took its place or superseded it, the word "temporary" would be the proper and apt word to describe that intention. The execution of a formal contract may be made a condition precedent to the existence of any binding arrangement, but the letters must be expressed in such a way as to show clearly that such a condition is intended; and that was not done here. There are no words appropriate for introducing a condition or stipulation in the manner recognised in *Chillingworth* v. *Esche*[4] and *Von Hatzfeldt-Wildenburg* v. *Alexander, supra.*

It is I think right that an order under R.S.C. Order 14 should be made only if the court thinks it is a plain case and ought not to go to trial. If one simply has a short matter of construction with a few documents, the court on summary application should decide what in its judgment is the true construction. There should be no reason to go formally to trial where no further facts could emerge which would throw any light upon the letters that have to be construed.

I am satisfied that there are no triable issues. This is simply a case of construction of the letters passed between the parties and I decided that in favour of the plaintiffs. I therefore allowed the application with costs.

*Application allowed.*

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## THAM CHEOW TOH v. ASSOCIATED METAL SMELTERS LTD.

**[F.C. (Azmi L.P., Suffian and Ali F.JJ.) January 22, 1972]**

**[Kuala Lumpur — Federal Court Civil Appeal No. 22 of 1971]**

*Contract — Terms — Breach of — Goods not according to specification — Damages — Measure of — Contracts (Malay States) Ordinance, 1950, s. 74.*

*Sale of Goods — Breach of condition — Waiver — Election to treat as breach of warranty — Sale of Goods (Malay States) Ordinance, 1957, ss. 13(1) and 59(1)(b).*

*Damages — Sale of goods — Breach of warranty — Quantum.*

This was an appeal from the decision of the High Court ([1971] 1 M.L.J. 271).

The defendant/appellant had agreed to sell a metal melting furnace to the plaintiff/respondent and had given an undertaking that the melting furnace would have a temperature of not lower than 2,600 degrees F. This specification was not satisfied.

The respondent brought an action alleging breach of an express condition of the contract and claimed the total sum of $29,301.38 as damages.

The learned trial judge held that the failure on the part of the appellant to supply a furnace according to specifications constituted a breach of the condition of the contract entitling the respondent to treat it as a breach of warranty, and awarded a total sum of $7,501.38 as damages for loss of profits.

The defendant appealed.

**Held,** dismissing the appeal: (1) the learned trial judge was correct in finding that there was a breach of a condition of the contract which entitled the respondent/plaintiff to waive it and to elect to treat the breach as a breach of warranty within the meaning of section 13(1) of the Sale of Goods (Malay States) Ordinance;